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In the Supreme Court

OF THE

United States

OCTOBER TERM 1982

TRUCKEE-CARSON IRRIGATION DISTRICT,
Petitioner,

VS.

UNITED STATES OF AMERICA and
PYRAMID LAKE PAIUTE TRIBE OF INDIANS,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF OF TRUCKEE CARSON IRRIGATION DISTRICT

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TABLE OF CONTENTS

I. Introduction 1

II. Argument

A. Contrary to respondents' contentions, the *Orr Ditch* situation is not unique 1

B. The requirement of pleading adversity in a comprehensive water right adjudication will foster uncertainty and relitigation . 2, 3, 4, 5, 6

C. Review of the decision below should not be deferred 6

III. Conclusion 9

TABLE OF AUTHORITIES

Arizona v. California, 373 U.S. 546 (1963) 5

Arizona v. California, No. 8, Original, *pending* 2

Cappaert v. United States, 426 U.S. 128 (1976) 5

Colville Confederated Tribes v. Walton, 647 F.2d 42 (9th Cir. 1981) 5

Northern Cheyenne Tribe v. Adsit, 668 F.2d 1080 (9th Cir. 1982), *petition for cert. filed,* 50 U.S.L.W. 3965 (No. 81-2188) 5

Pueblo of Picuris v. Abeyta, 50 F.2d 12 (10th Cir. 1931) 4

Pyramid Lake Tribe of Indians v. Morton, 354 F.Supp. 252 (D.D.C. 1973)..... 7

San Carlos Apache Tribe v. Arizona, 668 F.2d 1093 (9th Cir. 1982), *petition for cert. filed,* 50 U.S.L.W. 3949 (No. 81-2147) 5

Scooper-Dooper, Inc. v. Kraftco, 494 F.2d 840 (3d Cir. 1974)..... 4

United States v. Adair, 478 F.Supp. 336 (D. Ore. 1979) 5

United States v. Alpine Land & Reservoir Co., 503 F.Supp. 877 (D. Nev. 1980), *appeal pending,* Nos. 81-4084, 81-4116 (9th Cir.) 7

United States v. New Mexico, 438 U.S. 696 (1978).... 5

I INTRODUCTION

In its petition for certiorari petitioner Truckee-Carson Irrigation District ("TCID") argued that the decision below warrants review because it presents important issues concerning the preclusionary bar of *res judicata*, has potentially far-reaching impact on water rights in the West, both under adjudication decrees and water right settlement agreements, and is wrong. Sixteen states either filed their own petitions to have the decision reviewed, or filed briefs supporting TCID's petition for review.

Respondents United States and the Pyramid Lake Paiute Tribe of Indians ("Tribe") have filed separate briefs which oppose the granting of a writ because, they argue:

A. The situation presented by this case is unique and therefore the decision below will have little precedential value.

B. The decision below does not depart from established principles of preclusion, and

C. Review is premature.

Each of these contentions is incorrect and will be addressed in turn.

II ARGUMENT

A. Contrary to Respondents' Contentions, the Orr Ditch Situation is not Unique.

Respondents have both argued that review of the decision below is unwarranted because the situation which gave rise to the dispute is unique and not likely to recur. (U.S. Brief, p. 24, Tribe's Brief, p. 17.) These assertions are not founded in reality. Proof of this can be found as readily as reading the supporting brief of *amicus curiae* State of New Mexico, which identifies three pending cases in which tribes have not intervened and the United States is advancing competing water claims. (New Mex. Brief, p. 1.) In such cases, the reser-

vation water right could be relitigated in the future based on the principles established by the Ninth Circuit in the instant case. Additionally, in *Arizona* v. *California*, No. 8, Original, now pending before this Court, one of the contentions is that the United States could not have adequately represented the five Indian tribes' competing water claims in the earlier proceedings.[1]

It must be remembered that at the time of the original *Orr Ditch* litigation the federal attorneys acted in good faith and advanced as large a right as possible on behalf of the Reservation. (A-100.) It is only now, with the twenty-twenty hindsight provided by recent court decisions, that an issue can be identified on which evidence might have been presented in the prior case.

The vastness of the United States' land holdings in the west, the myriad purposes for which the government holds such lands, and the same inability to foretell the future which afflicted the *Orr Ditch* attorneys, simply preclude any realistic assertion that the *Orr Ditch* situation is unique and will never recur.

B. The Requirement of Pleading Adversity in a Comprehensive Water Right Adjudication Will Foster Uncertainty and Relitigation.

While respondents' claims of the singularity of the Truckee River situation are unfounded, there is one unique, though recurring, aspect of the situation. Forming the center of the controversy is the tension which results from the government's necessary representation of multiple claims in a com-

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[1] That the Court retained jurisdiction in that case is merely a fortuitous circumstance. The multiple federal representation of competing claims therein, and the fact that irrigable lands were omitted from the claims previously advanced by the United States on behalf of the tribes, belies the United States' assertion that the *Orr Ditch* case is unique.

prehensive adjudication, juxtaposed against the formalistic edicts of traditional *res judicata*. The broad spectrum of the government's responsibilities requires a more practical application of *res judicata* principles than that adopted by the Ninth Circuit decision below.

Traditional *res judicata*, of which collateral estoppel is one branch, has historically required the existence of formal adversity in prior litigation between the party later asserting preclusion and the party against whom it is asserted.[2] Practical considerations of judicial economy and fairness, however, have prompted the courts to reexamine the necessity and productiveness of this technical requirement, and to reject it as a prerequisite of preclusion where issues have been actually litigated in an adversary context.

The same analysis applies to claim preclusion, as the Ninth Circuit recognized in its decision below when it extended the protection of claim preclusion to subsequent appropriators who were strangers to the *Orr Ditch* litigation. (A-50.) As the court noted, because of the comprehensive nature of the adjudication and the adversity between the plaintiff and the defendants, "it could be justly supposed that the parties would assert *all* their claims and defenses." (A-49; emphasis added), and that under such circumstances it would be "manifestly unjust" not to accord the non-party subsequent appropriators the preclusionary benefits of *res judicata*. (A-50.) It is both logically and precedentially inconsistent then, not to accord TCID the benefit of its application as well. As the Third

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[2]Collateral estoppel and *res judicata* are principally distinguished by the fact that collateral estoppel bars relitigation only of issues previously litigated and *res judicata* bars claims which might have been, but were not, for whatever reason, litigated. But in *Orr Ditch*, the Tribe's Winters doctrine cause of action *was actually litigated* in an adversary proceeding. (See A-49, A-50, A-104).

Circuit Court of Appeals held in *Scooper-Dooper Inc.* v. *Kraftco*, 494 F.2d 840, 845 (1974), "we see no reason to treat a co-plaintiff more harshly than a total stranger." (*See also* cases cited in TCID Pet. pp. 13-17.)

The reasons for abolishing the requirement of formal pleading adversity go far beyond the practical concern of judicial economy in cases in which the United States has necessarily litigated multiple claims in a comprehensive adjudication.[3] Although formal adversity presents a technical, but not insurmountable, hurdle for most parties who assert claim preclusion as a defense, the same cannot be said in suits such as the instant case. Where the United States asserts water rights in its multiple capacities, creation of the formal adversity required by the Ninth Circuit in its decision below may simply be unattainable. Indian tribes, as sovereigns, are immune from suit and thus *cannot be joined* in a comprehensive water adjudication without their consent. Certainly, therefore, such formal adversity is not within the power of the United States or any other party to create. Under the Ninth Circuit's ruling, such formal adversity is solely within the control of the Indian tribes themselves — a fact which makes sham of the principle that the United States controls litigation of Indian claims (*Pueblo of Picuris* v. *Abeyta*, 50 F.2d 12 (10th Cir. 1931)), and erodes the entire concept of government-Indian ward guardianship.

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[3]Significantly, the court below correctly noted that "any other conclusion [than that non-party subsequent appropriators are entitled to the benefits of claim preclusion] would make it impossible ever to quantify a reserved water right." (A-50).

As a result of tribal sovereign immunity and the Ninth Circuit ruling below, the government will simply be unable to achieve finality in either its proprietary or Indian water rights.[4] The certainty of water rights, on which valid planning decisions in both the public and private sector must be based, becomes a mirage.

While collateral estoppel might seem to afford some degree of finality as to issues actually litigated, such protection is undependable at best. First, the requirement of formal adversity has not been abandoned in all circuits, and in such circuits, even issue preclusion may be unavailable. Second, as illustrated by this case, recent cases (*Arizona* vs. *California*, 373 U.S. 546, 601 (1963); *Cappaert* v. *United States*, 426 U.S. 128 (1976); *(United States* v. *New Mexico*, 438 U.S. 696 (1978)), and others now pending in the courts (*see e.g., Coleville Conferderated Tribes* v. *Walton*, 647 F.2d 42 (9th Cir. 1981); *United States* v. *Adair*, 478 F. Supp. 336 (D.Ore. 1979)), reserved water right concepts are still emerging, with the consequence that new and previously unforeseen issues which can serve as the basis for relitigation, are constantly evolving.

The case at bench illustrates that point. The government attorneys in *Orr Ditch* represented the Tribe's interest properly and in good faith and intended, as did all concerned, that the final decree be a final comprehensive adjudication of all

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[4]The Ninth Circuit has recently foreclosed the only other avenue for obtaining final comprehensive water right adjudications by ruling that states, under their admissions acts and their constitutions, lack subject matter jurisdiction to adjudicate Indian water rights, even in statutory adjudications to which the United States has consented pursuant to the McCarran Act. *(Northern Cheyenne Tribe* v. *Adsit*, 668 F.2d 1080 (9th Cir. 1982), *petition for cert. filed*, 50 U.S.L.W. 3965 (U.S. May 21, 1982) (No. 81-2188), and *San Carlos Apache Tribe* v. *Arizona*, 668 F.2d 1093 (9th Cir. 1982), *petition for cert. filed*, 50 U.S.L.W. 3949 (U.S. May 5, 1982) (No. 81-2147).)

rights, including the reserved right of the Pyramid Lake Reservation, on the Truckee River. (A-100.) But subsequent judicial decisions further defining the *scope* of federal reserved water rights have uncovered new "issues" which, if accepted as such, preclude application of collateral estoppel and thus defeat the finality of the prior decree.

More than simply permitting inconclusive judgments involving federal water rights the Ninth Circuit decision actually *encourages* them. If, as the court below has held, a tribe cannot be bound by a judgment in an action in which the government represented both trust and proprietary interests, there is certainly little incentive for the tribe voluntarily to intervene in the action. By foregoing intervention, a tribe preserves its right later to challenge the outcome of the case if it subsequently becomes advantageous to do so. The decision below, by erecting a technical formal adversity requirement as a barrier to application of *res judicata*, thus gives Indian tribes *two* opportunities to litigate their claims, as opposed to the single opportunity afforded others.

C. Review of the Decision Below Should Not Be Deferred.

Respondents have argued that review of the ruling below at this time is premature, since further proceedings in this and other cases may result in accommodation of the water needs of the Tribe and the petitioners. Such an argument, however, ignores the fact that the ultimate decision concerning apportionment of Truckee River water rights will not and cannot affect the impact of the present ruling as *stare decisis* on important *res judicata* and due process issues.

Postponement of review of the lower court's decision for the four to five years required for a trial, decision, and appeal on the balance of the case will only continue the unwarranted vitality and precedential value of the decision below. The issues will not be further developed in the course of the action;

they are now as sharply focused as they ever will be. Indeed, if, as respondents contend, a water allocation accommodation can be achieved between the parties, the impact of the decision below on the instant parties will be blunted, and the subsequent presentation for review of the important issues involved may suffer as a result. The precedential value of the decision, however, would be unaffected.

Both respondents have attempted to characterize this litigation as an inseparable part of a larger coordinated effort to solve the water problems of the Truckee River users and the Pyramid Lake Tribe. The government has implied and the Tribe has expressly contended that review by this Court at this time may somehow jeopardize the effectiveness of those other efforts. (U.S. Brief, p. 18; Tribe's Brief, p.19.) Nothing could be less true. Each of the other cases described by the respondents (U.S. Brief, p. 4, n. 6; pp. 6-8, n.8; Tribe's Brief, pp. 4-8) challenges the entitlement of upstream water users to the amounts they have claimed and diverted. These challenges rest not upon any claimed water right for the Pyramid Lake Reservation but, rather, on the alleged lack of right of the upstream diverters.[5] *None* of the rights asserted by respond-

[5]The Tribe repeatedly alludes to "wasteful practices" and "unnecessary diversions" in referring to the use of water by TCID's farmers on the Newlands Project citing *Pyramid Lake Paiute Tribe of Indians* v. *Morton*, 354 F.Supp. 252 (D.D.C. 1973). (E.g., Tribe's Brief, p. 5.) TCID was not a party to that case and, predictably, the Tribe's unopposed assertions concerning TCID's "wasteful use of water" were accepted by that court as true. By contrast, in *United States* v. *Alpine Land and Reservoir Co.*, 503 F.Supp. 877 (D.Nev. 1980) appeal pending, Nos. 81-4084, 81-4116 (9th Cir.) to which TCID *was* a party, and in which the reasonableness of TCID's water practices was the principal issue, the Court found that TCID's use of water was reasonable and economical. The reasonable water duty found by the Court in *Alpine* was 3.5 acre-feet per acre for bottomlands and 4.5 acre-feet per acre for benchlands, the same water duty decreed in *Orr Ditch* and agreed to in the Truckee River Agreement.

By contrast, the reasonable water duty of the reservation lands was determined by the Special Master in *Orr Ditch* to be 3.3 and 4.1 acre-feet per acre applied to the land for bottomlands and benchlands, respectively. But the United States insisted that the Truckee River Agreement and *Orr Ditch* Final Decree provide for even *more* water for the Tribe, and succeeded in securing a reservation right to 4.1 and 4.7 acre-feet applied per acre for bottom and benchlands, respectively.

ents in any of the related cases is dependent on or will be affected by the outcome of the controversy in the litigation before this Court. Nor, conversely, will the outcome of this case affect the courts' determinations in any of the other cases now pending.

The only conceivable impact of this Court's decision to review or not to review the decision below is that, in related out-of-court water settlement negotiations, one party or the other may lose negotiating leverage. (Tribe's Brief, p. 19). This is not a proper consideration in deciding whether the ruling below should be reviewed. But, even if such a consideration were appropriate, to the extent that the negotiating leverage of a party rests on an incorrect court decision below, it represents an unfair advantage which should be and can be alleviated by a prompt ruling by this Court. Furthermore, there is every reason to believe that the certainty which will result from this Court's review of the issues presented here will encourage rather than discourage negotiated settlement, since all parties will then be better able to ascertain the strength and reliability of their claims of right and to adjust their negotiating positions accordingly.

Deferral of review of the lower court's decision will perpetuate the unnecessary unsettling of water and property rights throughout the West and the economic and human hardships which inevitably accompany such uncertainty. As stated in the petitions of both TCID and the State of Nevada, and as attested to by the supporting amicus curiae briefs from virtually all of the states west of the Mississippi River, the issues presented are important enough and potentially disruptive enough to warrant review by this Court without further delay.

III CONCLUSION

For the reasons stated in the petition and herein, petitioner prays that a writ of certiorari issue from this Court.

Dated: September 10, 1982.

Respectfully submitted,

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